

Island County officials await Supreme Court decision on private attorneys

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For 111 years, a law that allows county commissioners to hire private attorneys has gone unchallenged.

It took a group of stubborn Island County elected officials with a fractured relationship to finally test the limits of the statute in question.

The disagreement between the county prosecutor and the board of commissioners made its way to the Washington State Supreme Court last month. Attorneys were grilled by justices when they presented opposing arguments in the case Washington V. Susan Drummond. The question the justices will ultimately answer is whether county commissioners can hire private attorneys over the objection of the county prosecuting attorney.

The primary statute in question, RCW 36.32.200, states that it is unlawful for commissioners to hire an attorney to perform a prosecutor's function unless the contract is "approved by the presiding superior court judge." The question, however, is under what circumstances the judge can approve the contract.

County officials are now awaiting a decision that may have an impact on counties statewide.

"The prosecutor is proposing a sea change in how local government in Washington works," said attorney Scott Missall, who is representing the Island County commissioners.

Island County Prosecutor Greg Banks is represented by Pam Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys. She asked the supreme court to oust outside attorney Drummond from her contract to provide legal advice to the commissioners. She argued that under state law it's the prosecutor's job to give legal counsel to commissioners and that hiring an attorney to do that work without an able prosecutor's permission is thwarting the will of the voters.

"I also ask this court to consider accelerating that decision since the people of Island County have been deprived of their counsel of choice since April of 2015 with regard to the growth management update," she told the justices.

The justices questioned her about what statute requires the commissioners to have the consent of the prosecutor to hire an private attorney. She argued that her argument was based on “an unbroken line of supreme court decisions.”

Justice Debra Stephens asked Loginsky why she isn’t challenging the constitutionality of the statute that’s at the center of the case. Loginsky said commissioners need a mechanism to hire an outside attorney if a prosecutor is unable to fulfill his or her duty, but the statute can’t be used without the prosecutor’s permission if the prosecutor is able to do the job.

On the other side, Missall said the statute clearly allows commissioners to hire outside attorneys with the approval of the presiding superior court judge and doesn’t require permission from the prosecutor. He said the statute is clear on its face.

“The fact is that 39 counties in Washington state have used the statute for 111 years without any problem,” he said.

Justice Charles Wiggins told Missall that one of his arguments was “a logical fallacy,” but Missall said he didn’t agree.

Justices asked Missall whether, under his argument, commissioners could hire their own attorneys to prosecute criminals if they didn’t like the prosecutor. Missall argued that they couldn’t because “prosecution” was the core function of the prosecutor, as compared to providing legal advice to county officials.

Justice Steven Gonzalez, however, pointed out that “prosecution” refers to both civil and criminal matters in the case he cited.

Chief Justice Barbara Madsen asked whether it would have been an issue if the commissioners hired Drummond as a consultant rather than an attorney. In fact, a previous board of Island County commissioners did hire an attorney as a consultant in order to get around having to get permission from the judges.

Justice Sheryl Gordon McCloud pointed out that the difference is that the commissioners would be able to have privileged conversations behind closed doors with an attorney, as compared to a consultant.

The disagreement between Banks and the board arose last year when commissioners hired Drummond to help with the update to the county’s comprehensive plan. They said they needed someone with expertise in the area of law to help them draft the plan and they questioned the ability of the prosecutor’s office.

Banks objected and later filed a lawsuit against Drummond, seeking to oust her as the commissioners’ land-use attorney. The commissioners joined the lawsuit on Drummond’s side.

Island County Superior Court judges agreed with the commissioners and wrote a strongly-worded letter supporting their interpretation of the law. Drummond and the commissioners won the case in Skagit County Superior Court on summary judgement, but then Banks asked the Supreme Court to take up the issue on direct review, which allows him to skip the appeals court step. The justices agreed.

“This is a pretty interesting political dispute in my opinion,” Justice Susan Owens said.

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